LEE EWE TEIK

v.

ARIFFIN HUSSAIN

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 845 OF 1983]
31 MAY 1990

TORT: *Liability - Diametrically opposite versions - Importance of photographs, plan and measurements of the scene - Nature of damage to the vehicle - Impression in witness box.*

The collision in this case occurred between the plaintiff who was riding the motorcycle and the driver of a lorry owned by the defendant. There was a conflict in relation to the time of occurrence of the accident, alleged directions in which the vehicles were travelling and the circumstances of the collision. The quantum of damages was agreed by both parties and the only issue was one of liability.

Held:

[1] In situations where both parties have given two diametrically opposite versions as to how a collision occurred, the photographs, plan and measurements of the scene, and the nature of the damage to each vehicle must provide the most reliable guide by which their versions can be tested.

[2] The evidence of the damage to the motor cycle and lorry is consistent with the driver's version of the collision and inconsistent with the plaintiff's version. The medical evidence is also more consistent with the driver's version.

[3] The collision was caused wholly by the dangerous driving of the plaintiff.

[Plaintiff's action dismissed with costs.]

Cases referred to:

San Seong Choy & Ors. v. Yuson Bien [1962] MLJ 427
Lai Yew Sing v. Chan Kim Siong [1987] 1 MLJ 403
Menah binti Sulong v. Lim Soo & Anor. [1983] CLJ (Rep) 263

For the plaintiff - Brijnandan Singh Bhar; M/s. Brijnandan Singh Bhar & Co.
For the defendant - Khoo Eng Chin (Tang Khye Kian with him); M/s. Tang Khye Kian & Co.

JUDGMENT

Edgar Joseph Jr J:

In this running down case, the quantum of damages has been agreed by Counsel on both sides so that the only question for decision was the issue of liability.

Briefly, the facts were these. On 8 November 1982, along the Bukit Mertajam - Butterworth Road a collision occurred involving a motor cycle ridden by the plaintiff ('the rider') and a motor lorry driven by a servant or agent of the defendant ('the driver'). That much was agreed, but as regards the circumstances of the collision and time of the same, there was an acute conflict of evidence.

The plaintiff rider's version was that at about 6. p.m. on that day he was proceeding in the direction of Butterworth in a perfectly normal manner, keeping close to the left edge of the road, when he was struck from the rear by the driver who was also proceeding in the same direction. On the other hand, the driver's version was that the collision occurred at about 8 p.m. whilst the motor lorry and the motor cycle were proceeding in opposite directions; in particular, the motor lorry was proceeding to Butterworth, when the motor cycle which was coming from the opposite direction emerged from behind another motor lorry, which it was overtaking, thus encroaching into the path of the driver and giving the latter no reasonable opportunity of avoiding the collision.

The plaintiff called no witnesses in support of his version though the defendant did call the lorry attendant (DW3) who corroborated the driver's version.

In such a situation where the plaintiff rider and the driver have given two diametrically opposite versions as to how the collision occurred, the photographs, plan and measurements of the scene, and the nature of the damage to each vehicle must provide the most reliable guide by which their versions can be tested. (See *San Seong Choy & Ors. v. Yuson Bien* [1962] MLJ 427, per Ismail Khan J (as he then was)).

In this case, the damage to the vehicles as evidenced by the photographs taken by the police on the day of the collision was, in my view, most material.

The photograph, Exh. P1C, shows that the front wheel of the motor cycle was badly damaged. By comparison such damages as there was to the rear wheel of the motor cycle was negligible if at all. The photograph, Exh.P 1D, shows that the front off side mudguard of the motor lorry was slightly damaged.

In my opinion, the evidence of the damage to the motor cycle and the motor lorry is consistent with the driver's version of the collision but quite inconsistent with plaintiff rider's version. If the plaintiff rider's version were true, I would have expected the rear wheel of the motor cycle to have been significantly damaged.

I am fortified in the view I take by the injuries sustained by the plaintiff rider. The medical evidence (see AB1 pp. 6/7) shows clearly that the main injuries sustained by the plaintiff rider were to the right side of his body. This again is more consistent with the driver's version rather than that of the plaintiff rider.

As for the sketch plan (D7) and the key, they were, in my view, of neutral value and did not support the version of either party since there was nothing therein to suggest where the point of impact was.

Accordingly, I unhesitatingly accepted the driver's version of how the collision occurred and rejected that of the plaintiff rider. I would add that the impression the driver made upon me as he testified from the witness box was that of a witness of truth. On the other hand, the impression the plaintiff rider made upon me was quite the opposite.

I would add that in arriving at my conclusions regarding the credibility and reliability of the plaintiff rider on the one hand and the driver on the other, I did so without placing any reliance on the testimony of the lorry attendant. It goes without saying that with the testimony of the attendant the case for the defence would be overwhelming.

I would also add, lest I be accused of an oversight, that although an attempt was made by Counsel for the defendant to show, by the introduction of the medical report (Exh. D8) of Dr. Lim Eng Cheong (DW1), that the plaintiff rider was intoxicated at the material time, in my opinion, the attempt was wholly unsuccessful as, upon the doctor's oral evidence, there was not a scrap of evidence of such intoxication and so this evidence, which was totally disregarded, played no part in arriving at my conclusion.

There was one remaining matter regarding which there was a sharp conflict of evidence. Whilst the plaintiff rider alleged that the collision occurred at about 6 p.m. the driver's version was that it was at about 8 p.m.

Now, the first information report in this case was made by a police constable on the day of the collision and in it he mentions that he had been informed of the same by a member of the public at about 8.50 p.m. There was also the evidence of Dr. Lim Eng Cheong that he first saw the plaintiff at the District Hospital Bukit Mertajam at between 9 p.m. to 10 p.m. that day.

These facts in my view are quite consistent with the driver's version that the collision occurred at about 8 p.m. and, in any case, I believe him.

Now, having found in favour of the driver's version as to how this collision occurred, I was of the view, that the cause of the collision was due wholly to the negligence - indeed, I would interpolate to say, the dangerous driving of the plaintiff rider - and that he was the author of his own misfortune. (See *Lai Yew Sing v. Chan Kim Siong* [1987] 1 MLJ 403). The plaintiff rider's whole case, as pleaded, and as deposed to by him in the witness box was that he was struck from the rear by the driver who was proceeding in the same direction as he was. This is a version I have rejected as being false and untrue; instead, I have accepted the driver's version, that the collision had occurred whilst both vehicles were proceeding in opposite directions, in particular, that the plaintiff rider was overtaking another motor lorry thus encroaching into the path of the driver giving the latter no reasonable opportunity of avoiding the collision.

In the light of these findings, and the failure of the plaintiff to plead or argue contributory negligence, I was of the view that although my human sympathies were with the plaintiff rider I was not at liberty to indulge them. In other words, I had no option but to dismiss his claim with costs. In this context, I find the following passages in the judgment of H.T. Ong, CJ when speaking for the Federal Court in *Menah binti Sulong v. Lim Soo & Anor*. [1983] CLJ (Rep) 263 precisely in point:

> The statement of claim alleged against the defendant driver total negligence - it was either that or nothing.

And, further down, on the same page he added:

> For one thing, it is manifest that he (the trial Judge) rejected altogether the very basis of the appellant's claim - that she was an innocent bystander standing still on a spot not permitted for the passage of any vehicular traffic when she was knocked down. Since her case was put that way, and that way only, the trial Judge was, of course, not at liberty to speculate where she was if, in truth, she was not on the grass. The issue before him required only a plain "yes" or "no", to which he gave his answer. In his view "the bicycle must have travelled across nearly half the road" to cause the accident. Accordingly he held the defendant not negligent in all the circumstances.

And, after that he added:

> We are also of the opinion that the appellant was nowhere near or on the grass when the collision took place. If she was not, the ground must fall away completely from under her feet. It is not open to this Court to try and make out a case for her which she never adumbrated in her own pleadings, or this Court, to treat the issue of contributory negligence as open.
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> (Emphasis is mine).

In all the circumstances, the action was dismissed with costs.

Also found at [1990] 2 CLJ 191